Supreme Court, U.S.
FILED

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No.
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**IN THE SUPREME COURT OF THE UNITED STATES**

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RONALD G. CALHOUN, PETITIONER

vs.

LILLENAS PUBLISHING

NAZARENE PUBLISHING BEACON HILL MUSIC, et al.

LIFEWAY CHRISTIAN RESOURCES
OF THE SOUTHERN BAPTIST
CONVENTION, f/k/a the Sunday School
Board of the Southern Baptist Convention,
d/b/a Lifeway Christian Stores,
CONVENTION PRESS, et al.
Defendants/Respondent

C.A. MUSIC, INC.

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*PETITION FOR WRIT OF CERTIORARI*
*TO THE ELEVENTH CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI

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David R. Smith
*Counsel of Record*
Brannen, Searcy & Smith
P.O. Box 8002
Savannah, GA 31412
(912) 234-8875

41 pp

## QUESTION PRESENTED FOR REVIEW

Is a plaintiff in a copyright infringement case entitled to a jury trial on the issue of whether his original protected work was copied by a defendant where the defendant's challenged work is shown to be strikingly similar to the plaintiff's original, or may such a defendant obtain judgment from the court as a matter of law, depriving the plaintiff of any jury trial, merely by claiming that the identical later work was independently created?

**PARTIES TO THE PROCEEDING**

1. Ronald G. Calhoun - Plaintiff/Petitioner

2. Lillenas Publishing - Defendant/Third-Party Plaintiff/Respondent

3. Nazarene Publishing House Beacon Hill Music - Defendant/Respondent

4. Lifeway Christian Resources of the Southern Baptist Convention, f/k/a The Sunday School Board of the Southern Baptist Convention, d/b/a Lifeway Christian Stores- Defendant/Respondent

5. Beacon Hill Music - Defendant/Respondent

6. Convention Press - Defendant/Respondent

7. Christian Artists Music, Inc. - Third Party Defendant/Respondent

8. The Southern Baptist Convention Lifeway Christian Resources, d/b/a Lifeway Christian Stores - Defendant/Cross Claimant/Respondent

9. The Sunday School Board of the Southern Baptist Convention Press - Defendant/Cross Claimant/Respondent

10. The United Methodist Publishing House - Defendant/Respondent

11. Cokesbury Publishing - Defendant/Respondent

12. Crystal Sea Recordings - Defendant/Respondent

13. Faith Music - Defendant/Respondent

14. Pilot Point Music - Defendant/Respondent

15. Psalmsinger Music - Defendant/Respondent

16. John Mathias - Defendant/Respondent

17. Hardy Weathers - Defendant/Respondent

18. Ken Bible - Defendant/Respondent

19. The Southern Baptist Convention - Defendant/Respondent

20. Broadman & Holman - Defendant/Respondent

21. Baptist Book Stores - Defendant/Respondent

22. Christian Copyright License International - Defendant/Respondent

23. World Music - Defendant/Respondent

24. Nelson/Word Ministry Services - Defendant/Respondent

25. Maranatha Music - Defendant/Respondent

26. Integrity Music - Defendant/Respondent

27. Integrity Church Services - Defendant/Respondent

28. Music Services - Defendant/Respondent

29. Cam Floria - Defendant/Respondent

30. Jeffrey Buchan - Defendant/Respondent

31. Robert McGee - Defendant/Respondent

Plaintiff/Petitioner is not aware of any parent corporations of publicly-held corporations which own 10% or more.

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Calhoun vs. Nazarene Publishing House, No. 499-159; Calhoun vs. The Southern Baptist Convention, No. 400-086, (S.D. Ga., filed Feb. 20, 2001.)

**IN THE SUPREME COURT OF THE UNITED STATES**

RONALD G. CALHOUN
Plaintiff/Appellant

vs.

LILLENAS PUBLISHING
Defendant/Third-Party Plaintiff

NAZARENE PUBLISHING BEACON HILL MUSIC, et al.
Defendants/Appellees

LIFEWAY CHRISTIAN RESOURCES
OF THE SOUTHERN BAPTIST
CONVENTION, f/k/a the Sunday School
Board of the Southern Baptist Convention,
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Defendants/Appellees

C.A. MUSIC, INC.
Third-Party Defendant/Appellee.

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**PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT**

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## BASIS FOR JURISDICTION

This petition arises out of the Court of Appeals decision of July 23, 2002, affirming the trial court's grant of summary judgment in favor of the Defendants and against Plaintiff/Petitioner. Plaintiff/Petitioner's Motion for Rehearing was denied on September 5, 2002.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(a).

## STATUTES INVOLVED IN THE CASE

17 U.S.C. §106, et seq.

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

## STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Plaintiff/Petitioner Ronald G. Calhoun [hereinafter "Calhoun"], at the time an active Christian musical artist, wrote an original song, "Before His Eyes," in 1969. He copyrighted the work, and, in 1970, recorded it on a record album which was then released to the public for sale and distribution. At that time, Calhoun toured and performed at religious gatherings, churches and meetings on a regular basis. "Before His Eyes" was Calhoun's best original song, and was performed by him at virtually all of his shows. He performed the song at least 60 times in live concert performances. He sold some 1200 copies of his album containing the song at these shows. He sold copies of the sheet music to the song at the shows. He gave copies of the music to other soloists he worked with at such shows and programs. He also performed the song several times on T.V. and radio on gospel and Christian broadcasting programs, including from the Grand Ol' Opry gospel show out of Nashville. He also distributed copies of the sheet music and tapes of his song at the Wyman Theater, home of the Grand Ol' Opry, in Nashville. All of these performances, sales and distributions were during the years between 1970 and 1976.

Calhoun was also employed as a music instructor at the Stamps-Blackwood School of Gospel Music in Kentucky during this period, teaching students from all over the country, including Washington, and using his song and its sheet music as a teaching tool.

Of course, all of these performances, and sales, and broadcasts of all the T.V. and radio performances, were directed to Christian music audiences - that relatively small segment of the population which

follows and consumes that genre of music and entertainment.

At the same time Calhoun was so aggressively marketing his work, Robert McGee [hereinafter, "McGee"] was the associate pastor at The King's Temple Church in Seattle, Washington, a "musical church" (as it is described by all of the witnesses offering statements for McGee), where the leaders and members of the congregation would sing "original songs," rather than traditional hymns, at the church services. Thus, at the time Calhoun was performing his song for fans of original Christian music, McGee was working in a church with several hundreds of these very people, singing non-traditional Christian songs. Obviously, McGee had a reasonable opportunity to hear "Before His Eyes," either directly or from the many original Christian music devotees by whom he was surrounded every day.

On a Sunday morning in 1976, during church services at The King's Temple Church, McGee sang the melody of the chorus of "Before His Eyes," substituting verses from scripture for the original lyrics. McGee claimed that the melody he sang was spontaneously created by him, and named it "Emmanuel." McGee claims that he was "inspired," and that the melody "just literally popped into my head," with no writing, practice, composition or construction at all. McGee was not a sophisticated musician or songwriter, lacking even the ability to write down the melody of "Emmanuel" after he sang it, and lacking the ability to transpose the song to another key.

Nevertheless, McGee copyrighted the melody of "Emmanuel" in 1983.

Calhoun first discovered "Emmanuel," published in a hymnal and attributed to McGee, in 1997. In 1999, Calhoun filed the present action as a *pro se* complaint in the Southern District of Georgia.

Additional defendants were added by a second complaint filed in March of 2000, and both actions were consolidated into the present case. Subject matter jurisdiction of the District Court was based upon 28 U.S.C. §1338(a), addressing civil copyright claims.

The District Court granted summary judgment to the Defendants, on the ground that Calhoun had not shown that "Before His Eyes," his original work, and "Emmanuel," McGee's subsequent work, were substantially similar, an important element of a copyright infringement claim. Calhoun vs. Nazarene Publishing House, No. 499-159 (S.D. Ga., filed Feb. 20, 2001).

Calhoun appealed the summary judgment order to the Eleventh Circuit Court of Appeals. That Court expressly found that the two works were not only strikingly similar, but, "practically identical." Calhoun vs. Lillenas Publishing, 298 F. 3d 1228, 1232 (11th Cir., 2002). Despite this finding of striking similarity, the Eleventh Circuit affirmed the summary judgment order of the District Court on different grounds, finding that McGee's claim that he independently created "Emmanuel," without copying "Before His Eyes," eliminated all questions of material fact in the case, and barred Calhoun's copyright claims.

This case raises the question of whether subjective declarations by an alleged copyright violator that his subsequent work was independently created, despite its striking similarity to the earlier copyrighted work of a plaintiff, requires judgment for the alleged violator as a matter of law, eliminating all questions of material fact. Clearly, such declarations should not absolutely preclude a copyright violation claim, and the Eleventh Circuit erred in adopting such a rule in the present case.

## ARGUMENT AND CITATION OF AUTHORITY

The Writ of Certiorari should be granted in this case, as the Eleventh Circuit in this action has decided an important question of federal law that has not been, but should be, settled by this Court. Further, the decision by the Eleventh Circuit in this case, finding that the subjective declarations of an alleged copyright violator eliminate all questions of fact, entitling the alleged violator to judgment as a matter of law, is in conflict with the decisions of other circuit courts on this question. This question is an important one which should be addressed by this Court, as the federal courts have exclusive jurisdiction over disputes regarding alleged copyright violations, and this Court is the ultimate authority on these matters. Further, in our present age of virtually universal access to all original work, future copyright violation disputes will be determined almost exclusively on the issue of independent creation or not. Accordingly, this Court should grant Certiorari in this case so that the conflict among the circuits over this important question, which is certainly likely to recur frequently, can be settled.

Copyright cases from all circuits universally agree that where, as here, the challenged subsequent work is "strikingly similar" to the earlier copyrighted work, a prima facie case has been made that the Defendant copied the Plaintiff's earlier work. See, e.g., Ferguson vs. National Broadcasting Company, Inc., 584 F. 2d 111, 113 (5th Cir., 1978); Selle vs. Gibb, 741 F. 2d 896, 901 (7th Cir., 1984); Repp & K&R Music, Inc. vs. Webber, 132 F. 3d 882 (2nd Cir., 1998). In such a case, the copyright infringement case defendant may still put forward his evidence of independent creation in an attempt to rebut this presumption. "The jury is only permitted to infer access from striking similarity; it need not do so."

Gaste vs. Kaiserman, 863 F. 2d 1061, 1068 (2nd Cir., 1989) (emphasis in original). In the present case, the Eleventh Circuit held that the Defendants' evidence of independent creation defeated Calhoun's claim as a matter of law, rather than rebutting the presumption of copying, so as to create a question for the fact finder. An examination of circuit court opinions on this issue shows that the majority of cases, and the better reasoned decisions, hold that a defendant's evidence of independent creation meets a plaintiff's prima facie case to create a question for the fact finder on the ultimate issue of copyright violation, and does not end the plaintiff's case as a matter of law.

The case of Repp & K&R Music, Inc. vs. Webber, 132 F. 3d 882 (2nd Cir., 1998) addressed this question directly. Defendant Andrew Lloyd Webber introduced affidavits from himself and his wife, stating that he wrote the challenged song in his home, with his wife. The Second Circuit Court reversed the trial court's summary judgment for Webber, holding that, where there is evidence that the challenged song is strikingly similar to the plaintiff's work, such evidence by the defendant of independent creation creates a factual issue for determination by the fact finder, and not a matter of law for decision by the Court. The appellate court disagreed with the trial court's apparent "opinion that some direct evidence was required to contradict [the defendant's] version of the events surrounding the beginnings of the ... [s]ong." 132 F. 3d 882, 891 (2nd Cir., 1998). The Circuit Court continued:

> Here again, the district court erred by undertaking the resolution of a disputed issue of material fact... The plaintiffs here have established a prima facie case of access through striking similarity, which certainly

> includes the element of probative similarity. Whether the evidence of independent creation here is sufficient to rebut the prima facie case established in this action is a question for the fact finder, whatever the contours of the burden of establishing the defense. Id.

While acknowledging that the comment "may well overstate the proposition," the Court also quoted from 2 Paul Goldstein, Copyright: Principles, Law and Practice §7.2.2 (1989), "Proof of independent creation, whether direct or circumstantial, should be taken with a grain of salt."

In Miller vs. Universal Studios, 650 F. 2d 1365 (5th Cir., 1981), the Fifth Circuit Court found a fact question on the issue of independent creation, which was answered by the jury in favor of the plaintiff. The defendant did meet the plaintiff's prima facie case of copying with evidence of independent creation, but that evidence simply presented an issue for the fact finder to decide. The plaintiff does retain the burden of proof on those issues, but the determination of whether that burden has been met is for the fact finder, and not the court.

A later case by the Fifth Circuit Court reached the same decision. In Peel & Company, Inc. vs. The Rug Market, 238 F. 3d 391 (5th Cir., 2001), the Fifth Circuit reversed the District Court's grant of summary judgment to the defendant in a copyright infringement case, rejecting the holding that the defendant's evidence of independent creation entitled it to summary judgment. The Court concluded, "Rug Market did present some evidence of independent creation... We do not view the evidence Rug Market presented as adequate to support a holding as a matter of law that the [disputed rug] was

independently created; rather, a genuine question of material fact remains on this issue, which we also leave for the fact finder." 238 F. 3d 391, 398.

In Keeler Brass Co. vs. Continental Brass Co., 862 F. 2d 1063 (4th Cir., 1988), the Fourth Circuit Court dealt directly with the effect of a defendant introducing evidence of independent creation after a plaintiff has made a prima facie case of infringement. That Court held that, where such evidence is introduced, the plaintiff has the burden of proof to show copying by the defendant, but the question of whether he has met that burden is for the finder of fact. Id., p 1066.

The Ninth Circuit Court of Appeals reached the same conclusion in Three Boys Music Corporation vs. Bolton, 212 F. 3d 477 (9th Cir., 2000). There, the Ninth Circuit let stand a jury decision in favor of the plaintiff's action, despite the declarations from the defendants of independent creation. The Ninth Circuit concluded that a reasonable juror could reject the defendants' testimony, and find actual copying despite the defendants' claims of independent creation. 212 F. 3d 477, 486.

Clearly, the decision of the Eleventh Circuit Court in the present case is in conflict with these decisions of the other circuits which have considered this question. Here, McGee's claim that he was "inspired" to sing, full blown, a melody written and copyrighted by Calhoun seven years previously was held sufficient to require judgment against Calhoun on the merits, as a matter of law. The cases cited by the Eleventh Circuit Court in support of its ruling do not hold that a question for the fact finder is eliminated in a case involving strikingly similar works where the defendant presents some evidence of independent creation. In fact, the cases cited by the Eleventh Circuit in favor of its decision did not involve strikingly similar works. This distinction is crucial, as

the striking similarity of the works is what creates the prima facie case to be met by a defendant's evidence of independent creation.

The Eleventh Circuit relied upon the case of Benson vs. Coca Cola Company, 795 F. 2d 973 (11th Cir., 1986). In that case, the Court expressly found that a showing of "striking similarity" had not been made by the plaintiff.

The Eleventh Circuit decision also cites the case of Ferguson vs. National Broadcasting Company, Inc., 584 F. 2d 111 (5th Cir., 1978). However, that case specifically found that the plaintiff presented no evidence of similarity of the two works, other than the two works, themselves. Ferguson vs. NBC, *supra*, held that the plaintiff's assertions were not probative evidence, and held there was no question of fact as to whether the two compositions were "strikingly similar." 584 F. 2d 111, 113, 114. Clearly, that case does not stand for the proposition that a defendant's bare assertions of independent creation are sufficient to dismiss a plaintiff's copyright infringement claim as a matter of law.

The circuit court decision which comes closest to supporting the ruling of the Eleventh Circuit Court in the present case is Selle vs. Gibb, 741 F. 2d 896 (7th Cir., 1984). That Court concluded that the plaintiff's work and the subsequent work allegedly written by the Bee Gees were not "strikingly similar," and based its decision on that finding, so the case is not directly on point. However, the Seventh Circuit decision got to that point by analyzing the complete lack of evidence from the plaintiff raising any reasonable possibility of access by the defendants to the plaintiff's earlier copyrighted work, and the lack of any argument regarding the defendants' subsequent independent creation of their work, which was documented on tape in a recording studio. Selle vs. Gibb, *supra*, provides a clear explanation of why evidence of access is

significant even in a case where striking similarity is found. The Court recognized that a showing of striking similarity allows a presumption of access without other evidence. However, it also recognized the possibility, however unlikely, of independent creation of the same work by two artists. The Seventh Circuit addressed that unacceptable result by requiring that, in addition to a showing of striking similarity, "there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer." Id., p. 901. The 7th Circuit Court continued, "Thus, although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimal threshold of proof which demonstrates that the inference of access is reasonable." Id., at 902.

The Selle, *supra*, court adopted an analysis by which the amount of evidence of access required to make out a plaintiff's prima facie case varies depending upon the degree of similarity of the two works at issue. Id., p. 903. Where, as here, the defendant's challenged work is "practically identical" to the plaintiff's earlier copyrighted work, only minimal showing of access is necessary to satisfy this requirement. Petitioner suggests to this Court that this analysis provides a proper way to evaluate such cases.

The Eleventh Circuit Court's decision in this case examined the evidence of access in its analysis of the issue of independent creation, but, given the striking similarity between the two works in this case, it set much too high a burden for Calhoun on this issue. Access is not an element of Calhoun's case which he must satisfy to establish a prima facie case. Access is presumed from the striking similarity of the infringing work. Rather, Calhoun need only show sufficient evidence on that issue "to meet some

minimal threshold of proof which demonstrates that the inference of access is reasonable." Id. A "possibility" that the work was "available" is sufficient to justify the inference.

As shown, virtually every copyright decision from all circuits recites the rule that a showing of striking similarity alone, without other evidence, can satisfy a plaintiff's requirement for proof of access. Obviously, if the scrutiny given to evidence of access is the same even where a showing of striking similarity is made, all of that language in all of those cases is completely meaningless. Rather, the proof of access required after a showing of striking similarity is only that "minimum threshold of proof" described in Selle vs. Gibb, *supra*. The Eleventh Circuit applied an incorrect standard to reach its decision on the effect of the Defendants' evidence of "independent creation."

The facts set out in the Statement of the Case, above, demonstrate the required "minimum threshold of proof," a possibility that the work was available to McGee. By adopting a much higher requirement of access as a part of its discussion of the likelihood of independent creation, the Eleventh Circuit in this case created a new, and extremely harsh, standard for copyright infringement plaintiffs not found in other circuits.

The question is not whether Calhoun's evidence of access and copying is persuasive or compelling. The question is whether it is sufficient to allow the presumption of access to go to the jury, with all of the evidence, to decide the issue. By considering the evidence of access under much too harsh a standard, the Eleventh Circuit Court removed a contested issue of fact from the fact finder.

The Eleventh Circuit decided this case on its finding that McGee's evidence of independent creation eliminated any question for the jury on that issue. As shown above, there appear to be no cases from other

circuits where, as here, a showing of striking similarity was made, but the issue of independent creation was decided against the plaintiff as a matter of law based upon the defendant's claim of independent creation. As also shown, the decisions of other circuits, such as Repp vs. Webber, 132 F. 3d 882 (2nd Cir., 1998), expressly hold that such testimony by a defendant leaves the question for the fact finder, and not the court. The facts of this case demonstrate amply that here, too, the question of independent creation is one which should be answered by the fact finder and not by the court.

As shown, by definition, a finding of striking similarity establishes that two works are so similar as to preclude the reasonable possibility of independent creation. That finding has been made here. The Defendants may rebut that presumption with evidence of McGee's alleged independent creation, but the question of whether they have done so successfully should be for the fact finder, and not the court. In all circuits besides the Eleventh, it would be.

There is considerable other evidence in the record of this case raising questions about the credibility of the Defendants' independent creation evidence. McGee's affidavit in this case states that "Emmanuel" simply burst from his lips, full-blown, in church one Sunday, with no writing, practice or construction at all. Thus, no one saw him write it; they simply heard him sing it. The only evidence that he created it is his own self-serving testimony. The Court in Repp vs. Webber, *supra*, noted the inherent credibility problems with this kind of evidence, and found a jury question on the issue of independent creation.

The very fact that "Emmanuel" popped out of McGee without any process of construction makes it much more likely that he was repeating, consciously or not, a melody he had already heard, rather than

composing a new work[1]. Many cases have noted the relevance of the creative process, and the length of time it took, in evaluating evidence of independent creation. See, e.g., Three Boys Music Corp. vs. Bolton, 212 F. 3d 477 (9th Cir., 2000); Miller vs. Universal Studios, 650 F. 2d 1365 (5th Cir., 1981); Selle vs. Gibb, 741 F. 2d 896 (7th Cir., 1984); Herzog vs. Castle Rock Entertainment, 193 F. 3d 1241 (11th Cir., 1999).

McGee's lack of sophistication as a musician and songwriter also casts doubt upon his claim to have spontaneously burst forth independently with a song identical to that written by Calhoun seven years earlier. His statement establishes that he had to get the church music director to write down "Emmanuel" after he sang it, and that he, himself lacked even the ability to transpose the song to another key. Courts considering the question of independent creation have considered the creative capability of the defendant as a relevant factor. See Selle vs. Gibbs, *supra*. (Bee Gees had composed over 160 songs); Ferguson vs. National Broadcasting Co., *supra*, (John Williams had previously composed many important film scores and won an Academy Award); Herzog vs. Castle Rock Entertainment, *supra*, (John Sayles was critically acclaimed screenwriter and director, with an Academy Award nomination). The evidence in this case suggests it would be quite remarkable for the untrained McGee instantly to compose a now-popular melody without exposure to Calhoun's existing identical work.

The Eleventh Circuit opinion emphasized the fact that McGee burst forth with "Emmanuel" without any lead sheets or sheet music. The lack of written music that Sunday morning is not evidence of

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[1] Copyright infringement liability exists even where the copying is subconscious or innocent. See Repp vs. Webber, *supra*; BTMC vs. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y., 1976).

independent creation. McGee could as easily have sung "Happy Birthday," or "Jesus Loves Me," without sheet music, but he certainly did not write those songs. A melody, once heard, can be carried in one's head and reproduced later, with or without written notes. For this reason, the statements of other church members who saw McGee sing the song add nothing to his own self-serving statements.

As noted before, the timing of the alleged creation of "Emmanuel" also makes the possibility of independent creation less likely. Calhoun was actively promoting "Before His Eyes" to audiences interested in original Christian music during the several years immediately prior to McGee's alleged creation. McGee is among those people most likely to have heard "Before His Eyes," given his profession and his employment in a "music church," and "Emmanuel" was first sung by him at the time he would have been most likely to have heard it.

Clearly, this evidence would be sufficient to raise a fact issue for the jury on the Defendants' claim of independent creation under the rules applied in any other circuit, and those rules properly resist blind acceptance of the self-serving declarations of an alleged copyright infringer. The burden would remain on Calhoun to overcome the evidence of spontaneous creation, but the fact finder in this case should hear all of the evidence and make that decision, rather than allowing McGee's statements to end the dispute as a matter of law.

## CONCLUSION

It has been shown that other circuits which have considered this question, including the Second, Fourth, Fifth and Ninth Circuits, have all held that, where an alleged copyright infringing subsequent work is strikingly similar to the original copyrighted work, declarations of independent creation by the alleged

infringing defendant serve only to create a question for the fact finder as to whether the plaintiff has carried his burden of proof to demonstrate copying of his work. Such declarations do not establish, as a matter of law, that the plaintiff's claim is without merit. The Eleventh Circuit in the present case has established this harsh and undesirable rule, in conflict with the other circuit courts which have considered the question. Accordingly, this Court should issue a Writ of Certiorari to review this case, and resolve the dispute between the circuits, and to answer this important question, which surely will continue to arise again in the future.

Respectfully submitted, this 21ST day of March, 2002.

BRANNEN, SEARCY & SMITH

BY: _____

**DAVID R. SMITH**
Georgia Bar No. 655587
**Attorney for**
**Plaintiff/Petitioner**

Post Office Box 8002
Savannah, Georgia 31412
(912) 234-8875